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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GERALD A. DELEMUS,

Defendant.

2:16-CR-00046-GMN-PAL

**GOVERNMENT'S RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO REOPEN
DETENTION HEARING (ECF No.
546)**

Certification: This response is timely filed pursuant to LR (CR) 12-1.

The United States, by and through the undersigned, respectfully submits its Response in Opposition to Defendant Gerald A. DeLemus's ("DeLemus") Motion to Reopen his Detention Hearing, pursuant to 18 U.S.C. § 3142(f) (ECF No. 546) (hereinafter "Motion" or "Motion to Reopen"). For the reasons set forth below, the Motion should be denied. DeLemus offers no new and material information that was not already known to the movant at the time of his detention hearing or otherwise considered at his initial detention hearing.

BACKGROUND

On March 2, 2016, a federal grand jury seated in the District of Nevada returned a Superseding Criminal Indictment, charging DeLemus and 18 other defendants with, among other things, conspiring to assault federal officers, obstruct justice, extort federal officers, and use and brandish a firearm in relation to a crime of violence, and the substantive offenses that comprise the objects of the conspiracy, all in violation of Title 18, United States Code, Sections 371; 372 111(a)(1) and (b); 1503; 1951; and 924(c).

On March 3, 2016, DeLemus was arrested in the District of New Hampshire pursuant to an arrest warrant issued from the Superseding Indictment. DeLemus made his initial appearance in New Hampshire on March 3, 2016, at which time the government moved for detention both as a risk of non-appearance and danger to the community, filing a detailed memorandum in support of detention. Case No. 1:16-mj-24 (District of New Hampshire), attached as Exhibit 1.

On March 7, 2016, the Court in New Hampshire held a detention hearing presided over by United States Magistrate Judge (“Magistrate Judge”) Andrea K. Johnstone. *See* Transcript of Detention Hearing of March 7, 2016, attached at Exhibit 2. At the detention hearing, both parties proffered evidence and presented argument. Specifically, DeLemus proffered that he has a large number of supporters, many of whom occupied elected positions in New Hampshire government and who believed him to be a peaceful individual. He also presented three elected officials at the hearing as witnesses to DeLemus’s character and standing in the community: State Representatives Warren Groen, John Burt, and

1 David Bates. His neighbor Stephanie Monza also testified in support of his release.

2 After careful consideration of the evidence and the arguments presented by
3 both parties, Magistrate Judge Johnstone granted the government's motion,
4 entering a 13-page Order of Detention Pending Trial (hereinafter "Detention
5 Order" or "Order"), finding no conditions or combination of conditions that could
6 reasonable assure the safety of any person or the community. Exhibit 3. The
7 Court, however, did not find that DeLemus presented a risk of flight. *Id.*

8 On March 9, 2016, DeLemus moved to stay removal to Nevada in order to
9 appeal Judge Johnstone's Order before a district judge in New Hampshire. On
10 March 10, 2016, DeLemus moved for an extension of time to file an appeal of the
11 Order. On March 16, 2016, Magistrate Judge Johnstone denied the motion for
12 extension of time without prejudice noting that appeal of the Order was properly
13 venued in the District of Nevada.

14 On April 4, 2014, DeLemus made his initial appearance before United States
15 Magistrate Judge Carl W. Hoffman in the District of Nevada and was arraigned on
16 the Superseding Indictment. On April 7, 2016, Judge Hoffman continued
17 DeLemus's detention on the basis of Judge Johnstone's Order of Detention. *See*
18 Exhibit 4.

19 On April 26, 2016, DeLemus moved the District Court to review Judge
20 Johnstone's Order pursuant to Title 18, United States Code, Section 3145(b) (ECF
21 No. 319) and requested expedited briefing on unspecified grounds. The government
22 filed its response on May 6, 2016, (ECF No. 374).

23 On June 8, 2016, the Court denied the request as untimely in violation of
24

1 Local Rule IB 3-5. ECF No. 503. On June 17, 2016, DeLemus filed the instant
2 motion to reopen the detention hearing offering the following information in
3 support: (1) a Youtube video which DeLemus claims will show him as acting
4 peacefully in Burns, Oregon, during the occupation of the Malheur National
5 Wildlife Refuge (“Malheur”) during January and February 2016, and (2) additional
6 letters of support. As shown below, none of this information is new and material
7 and the Motion should be denied.

8 **ARGUMENT**

9 A detention hearing may be reopened at any time before trial if information,
10 not known to the movant at the time of the first hearing, is discovered, and the new
11 information has a material bearing on the issue of detention. *See* 18 U.S.C. §
12 3142(f)(2).¹ Courts strictly interpret this provision. *United States v. Turino*, No.
13 2:09-cr-132-JAD-GWF, 2014 WL 5261292, at *1 (D. NV Oct. 15, 2014) (“if
14 evidence was available at the original hearing, no rehearing is granted”).

15 DeLemus provides nothing *new and material* within the meaning of 18
16 U.S.C. § 3142(f) to support reopening his detention hearing. DeLemus claims that
17 his proffered video will show that he acted peacefully with regard to the armed
18 takeover of a federal facility in Oregon. This is not new – DeLemus made this very
19 same argument before Judge Johnston at his initial detention hearing:

20
21 Another thing that I think is very significant that happened in the
22 last two years is that there was -- as you're aware, there was an incident in

23 ¹ DeLemus’s claim that this Court may only consider whether DeLemus presents a danger
24 to the community is wrong. Mot. at 3. The court is currently considering whether to
reopen the hearing. If the court does reopen the hearing, it may give further consideration
to whether DeLemus presents a risk of non-appearance.

1 Oregon at the Mueller Federal Wildlife Reserve in Harney County, Oregon,
2 wherein some of the associates of Mr. Bundy tookover a wildlife preserve.
3 [...]

4 He then went to the wildlife preserve and he told the people, you
5 need to leave; this is wrong; you need to deal with this in the court system;
6 and he tried to act as a go-between. It didn't work, but he tried to act as a
7 go-between. He went -- while he was out there, he went there twice and he
8 had the same conversation with these people.

9 Exhibit 3, p. 17.

10 Thus, the argument – that DeLemus did not advocate violence at Malheur –
11 has already been made to Judge Johnstone, who considered it and nevertheless
12 found that DeLemus presented a risk of danger to the community warranting
13 continued detention. The fact that DeLemus now offers a video that he claims
14 shows him advocating a peaceful resolution to Malheur does not advance any new
15 and material argument; at best, it merely bolsters an argument already made and
16 rejected by Judge Johnstone.

17 Moreover, Delemus's video was made well in advance of DeLemus's arrest
18 and detention for Bundy Ranch. Thus, he was well aware of its existence before
19 his initial detention hearing and could have easily presented that evidence then.
20 The fact that his attorney in Nevada may or may not have been aware of it – as
21 DeLemus argues – is beside the point: DeLemus was aware of it. Further, it was
22 referenced in the government motion for detention at his initial detention hearing:

23 Despite his stated purpose to help stop the occupation, DeLemus
24 instead produced a number of sympathetic videos which he posted to
Facebook. Videos titled "The rest of the story," "the Untold Story-Jerry
DeLemus interview with ranchers" and "the Untold Story with Jerry
DeLemus in Harney County Oregon-Burns daily 2." These videos show
DeLemus in Burns, Oregon, interviewing local ranchers and the recounts
their self-serving views of the BLM. Another video, titled "the Untold Story-
Ammon with Jerry DeLemus extended cut," shows an interview on the

1 MNWR between Ammon Bundy and DeLemus.

2 Exhibit 1 at 18.

3 As shown above, and contrary to DeLemus's claims, the videos were known
4 to DeLemus and, in fact, are incriminating, not exculpatory: they show DeLemus's
5 intent to aid the armed occupiers and produce propaganda in support of their
6 cause. Thus, DeLemus does not advance any evidence that is material to his
7 release.

8 Lastly, none of the letters of support that DeLemus seeks to adduce at a re-
9 opened hearing is new and material. DeLemus knew that he had supporters in
10 his community at the time of his initial detention hearing. In fact, he asked four of
11 them to testify on his behalf. Moreover, as revealed in the letters themselves, the
12 authors were well-known to DeLemus long before the events that gave rise to his
13 detention hearing. Indeed, two of the letters referenced in DeLemus's motion are
14 from witnesses who testified in support of DeLemus in his initial detention
15 hearing: Messrs. Burt and Groen.

16 Not only was this information known and available DeLemus at the time,
17 but he argued it at his detention hearing and the Court specifically considered it.
18 Notwithstanding, Magistrate Judge Johnstone found that DeLemus presented a
19 risk of danger to the community, particularly, law enforcement officers, after
20 hearing from DeLemus's supporters.

21 The court accepts the witnesses' testimony as to their individual
22 experiences with the defendant as true for the purposes of this Order.
23 However, in determining whether the defendant is a danger to the
24 community, the court must consider whether the defendant "would be a
danger to any person or subset of the community" – including pretrial

1 officers, federal agents, and United States Marshals. [...] Consequently,
2 even if the court in this case could find a condition or a combination of
3 conditions that would reasonably assure the safety of some in the
4 community, no conditions will alleviate the danger to government officers in
monitoring and enforcing those conditions. Importantly, the defendant has
demonstrated a willingness to use lethal force against federal officers, and
recruit others to participate, without regard to lawful court orders.

5 Exhibit 3 at 11.

6 The record is clear that there is nothing new about the information
7 DeLemus seeks to advance here – Magistrate Judge Johnstone considered either
8 the same information or information just like it when evaluating the § 3142
9 factors, and, notwithstanding, found that the nature and circumstances of the
10 charged offenses, the weight of the evidence, and the nature of the danger posed
11 by DeLemus’s release warranted detention. There being nothing new and
12 material, the Court should deny the Motion. *See United States v. Masters*, No.
13 2:12-cr-00145-MMD, 2012 WL 4612665, at *2, n.1 (D. NV Oct. 1, 2012) (finding
14 that magistrate judge properly concluded the defendant had failed to present
15 material evidence not known at the time of the detention that would warrant
16 reopening the hearing and noting that the defendant conceded in his reply brief
17 that the magistrate judge’s decision was correct because no new evidence was
18 presented); *United States v. Dillon*, 938 F.2d 1412, 1145 (1st Cir. 1991) (affirming
19 district court’s denial of motion to reopen detention hearing where the proffered
20 new evidence consisted of 18 character affidavits from family, friends, and
21 employers; “this was available to the appellant at the time of the [original
22 hearing]”); *United States v. Hare*, 873 F.2d 796, 799 (5th Cir 1989) (affirming
23 refusal to reopen detention hearing because “testimony of [defendant’s] family and
24

1 friends in not new evidence”).

2 In the event the Court re-opens the hearing, the government seeks to
3 advance all the evidence and arguments proffered in its opening memorandum at
4 the initial hearing, which it incorporates herein in full. See Exhibit 1. To the
5 extent the Court takes additional evidence at a re-opened hearing, the government
6 reserves the right to present and proffer additional evidence and argument in
7 support of detention.

8 **WHEREFORE**, for all the foregoing reasons, the government respectfully
9 requests that the Court deny the Motion.

10 **DATED** this 5th day of July, 2016.

11
12 Respectfully,

13 DANIEL G. BOGDEN
14 United States Attorney

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CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **Government's Response in Opposition to Defendant's Motion to Reopen Detention Hearing (ECF No. 546)** was served upon counsel of record, via Electronic Case Filing (ECF).

Dated this 5th day of July, 2016.

/s/ Mamie A. Ott
MAMIE A. OTT
Legal Assistant